Supreme Court, U.S.
FILED
NOV 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-668

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF COLORADO,

Petitioner,

v.

ANTONIO HARRIS,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

JOHN MILTON HUTCHINS
First Assistant Attorney General
Appellate Section
Counsel of Record

JOHN DANIEL DAILEY
Deputy Attorney General
Appellate Section

Attorneys for Petitioner

1525 Sherman Street, 2d Floor
Denver, Colorado 80203
Telephone: (303) 866-3549

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	3

TABLE OF AUTHORITIES

	Page
Cases	
Berkemer v. McCarty, 468 U.S. 420 (1984)	2
Davis v. Mississippi, 394 U.S. 721 (1969)	1, 2, 3
I.N.S. v. Delgado, 466 U.S. 210 (1984)	2
Schmerber v. California, 384 U.S. 757 (1966)	2
United States v. Sharpe, 470 U.S. 675 (1985)	2
Constitutional Provisions	
U.S. Const. Amend. IV	1, 2
U.S. Const., Amend. V	1
Rules	
Colo. R. Crim. P. 41.1	1, 2

ARGUMENT

In his brief in opposition, respondent Harris (hereafter "Harris") argues that certiorari review is not warranted because the Colorado Supreme Court properly determined that his Fourth Amendment rights had been violated. In support of his position, he claims that: (1) *Davis v. Mississippi*, 394 U.S. 721 (1969) *holds* impermissible police questioning of suspects on less than probable cause; (2) COLO. R. CRIM. P. 41.1 does not authorize police to obtain "testimonial" evidence from suspects; (3) COLO. R. CRIM. P. 41.1 seizures are often more coercive than arrests because they take place without benefit of the presence of counsel; (4) rules of procedure and statutes adopted in other jurisdictions *explicitly* prohibit interrogation in this type of setting, at least in the absence of counsel; and, (5) *Miranda* warnings do not "cure" the otherwise unconstitutional seizure resulting from police questioning.

Harris's arguments miss the mark. The holding in *Davis* was not nearly as broad as Harris would have this Court believe: the *Davis* case involved an individual who was subjected to fingerprinting and questioning during a detention which was supported by *neither* probable cause *nor* (as here) *a court order*. Similarly, to say that the Colorado rule is addressed to "nontestimonial" evidence merely emphasizes the obvious: police *may compel* individuals to produce *nontestimonial* items of incriminating evidence without violating either the Fourth or Fifth Amendments to the United States Constitution; they *may not*, however, *compel* individuals to produce *testimonial items* of incriminating evidence without running afoul of the Fifth Amendment privilege against self-incrimination.

Schmerber v. California, 384 U.S. 757 (1966). One's decision to voluntarily provide incriminating, testimonial evidence simply falls outside the concerns of COLO. R. CRIM. P. 41.1.

With respect to Harris's third and fourth points, these emphasize right to counsel concerns which have no genesis in, or connection with, Fourth Amendment jurisprudence. His fifth point mistakenly presupposes the occurrence of a prior illegality which needed a cure; the *Miranda* warnings here, however, served simply (perhaps gratuitously)[1] to ensure that Harris's third and fourth concerns would be addressed.

Up until now, petitioner has responded only to the merits of Harris's position. Perhaps the most telling reason why this court should expend its precious resources to review this case lies, however, in the fact that Harris nowhere in his brief even mentions the critical case of *I.N.S. v. Delgado*, 466 U.S. 210 (1984). His failure to attempt to reconcile his position regarding *Davis* with *Delgado* is akin to "deafening silence" on his part.

———o———

[1]*See Berkemer v. McCarty*, 468 U.S. 420 (1984) (*Miranda* warnings need not accompany questioning incidental to an investigative detention); *United States v. Sharpe*, 470 U.S. 675 (1985) (investigative detentions are not necessarily limited to 15-20 minutes).

CONCLUSION

The Colorado Supreme Court held here that it is *Davis* and its progeny which bar police from questioning a suspect incidental to the execution of a legitimately obtained and otherwise valid court order authorizing the suspect's detention for purposes of compelling the production of nontestimonial evidence. For the reasons expressed in the original petition, in the amicus brief filed on petitioner's behalf by twelve other states, and in this reply brief, this Court should issue a Writ of Certiorari and either set the matter for full argument or order summary reversal here.

FOR THE ATTORNEY GENERAL

JOHN MILTON HUTCHINS
First Assistant Attorney General
Appellate Section

Counsel of Record

JOHN DANIEL DAILEY
Deputy Attorney General
Appellate Section

Attorneys for Petitioner

1525 Sherman Street, 2d Floor
Denver, Colorado 80203
Telephone: (303) 866-3549